

JONATHAN J. BART, ESQUIRE
Pennsylvania ID No. 49119
WILENTZ, GOLDMAN & SPITZER P.A.
Two Penn Center Plaza, Suite 910
Philadelphia, PA 19102
Phone 215.569.0000
Fax 215.636.3999
E-mail jbart@wilentz.com
(admitted *Pro Hac Vice*)

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JANET L. CHUBB, ESQUIRE
Nevada State Bar No. 176
LOUIS M. BUBALA III, ESQUIRE
Nevada State Bar No. 8974
JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, NV 89504-0281
Telephone: 775-786-5000
Fax: 775-786-1177
E-mail: jlc@jonesvargas.com
And tbw@jonesvargas.com
And lbubala@jonesvargas.com
Attorneys for Estate of Daniel Tabas and
Fertitta Enterprises, Inc.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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In re:

USA COMMERCIAL MORTGAGE
COMPANY, Debtor
USA CAPITAL REALTY ADVISORS,
LLC, Debtor
USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC, Debtor
USA CAPITAL FIRST TRUST DEED
FUND, LLC, Debtor
USA SECURITIES, LLC, Debtor

Affects:

☐ All Debtors

☒ USA Commercial Mortgage Company

:
: Case No. BK-S-06-10725-LBR
: Case No. BK-S-06-10726-LBR
: Case No. BK-S-06-10727-LBR
: Case No. BK-S-06-10728-LBR
: Case No. BK-S-06-10729-LBR
:
: Chapter 11
:
: ESTATE OF DANIEL TABAS'
: LIMITED JOINDER TO
: FERTITTA ENTERPRISES,
: INC.'S OPPOSITION TO
: DEBTOR'S MOTION TO
: AUTHORIZE USA

☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

: COMMERCIAL MORTGAGE
: COMPANY AS LOAN SERVICER
: TO ACCEPT PAYMENTS AND
: PROVIDE RECONVEYANCES
: AND IN FURTHER SUPPORT OF
: THE ESTATE OF DANIEL
: TABAS' MOTION FOR RELIEF
: FROM STAY

-----X

The Estate of Daniel Tabas ("Tabas"), by its undersigned counsel, hereby files this Limited Joinder to the Objection of Fertitta Enterprises Inc. to the Debtors' Motion to Authorize USA Commercial Mortgage Company as Loan Servicer to Accept Payments and Provide Recoveyances and in Further Support of The Estate of Daniel Tabas' Motion for Relief From Stay.

While Tabas is anxious to receive a payoff of this long defaulted loan - - a loan to which the Debtor made no effort whatsoever to obtain repayment either before or during the bankruptcy - - Tabas has serious concerns about the *bona fides* of the "deal" which the debtor claims to have reached with Colt Gateway and its principal, Robert MacFarlane. At the prior hearing on the consolidated motions of Tabas for relief from stay and of the Debtor to accept repayment, counsel for Tabas noted for the court that while Tabas would eagerly support a **real** repayment plan for the first mortgagees, there was neither a signed agreement for repayment with the borrower nor evidence of a firm commitment on the part of a financial institution to lend the money which Colt Gateway asserted would be the source of the repayment.

After listening to the arguments of counsel, the court ordered that the Debtor come forward with a copy of a binding written agreement by March 7 or Tabas' relief from stay motion would be granted and the majority first mortgagees (Tabas and Fertitta) could exercise their rights and remedies under Tabas' Loan Servicing Agreement ("LSA") to take over servicing and proceed to foreclosure. While the Debtor did produce a written agreement on

March 7, Tabas has serious concerns that the agreement is illusory. There is no binding commitment from a lender to finance the pay off and the so-called "term sheet" produced by Colt Gateway not only has expired (as of January 29, 2007) but is not a binding commitment in any event. A "loan commitment" is "[a] lender's **binding promise** to a borrower to lend a specified amount of money at a certain rate, usually within a specified period and for a specified amount." RCN Corp. v. Paramount Pavilion Group, LLC, 2004 W.L. 627057 (E.D.Pa. 2003) (at *6), citing, Black's Law Dictionary at 948 (7th ed. 1999). The expired letter from PRIF II Acquisition, LLC which is the purported source of money to repay the loan by Colt Gateway is anything but a commitment, as it states the following at page 12:

[t]his letter is intended to be a non-binding letter agreement regarding the contemplated transaction. Upon PRIF's satisfactory completion of its due diligence as contemplated herein, which PRIF shall endeavor to complete as soon as possible, the parties will attempt to negotiate definitive loan documents but intend that, other than rights or obligations of the parties which may arise out of a commitment issued by PRIF, **no legal rights or obligations will come into existence until the definitive loan documents are signed and delivered by the parties and all conditions to closing are satisfied . . .**

Clearly, Colt Gateway has no loan commitment which it requires in order to pay off the first mortgagee's on the Colt Gateway loan. That does not satisfy the court's requirement that the Debtor come forward with a definitive and binding repayment obligation of Colt Gateway. While Tabas is willing to give a short period of time to the Debtor to obtain such a document from Colt Gateway, it is unwilling to wait until April 15 only for a new fight to develop with Diversified, which claims rights it clearly does not possess and appears to be frustrating this transaction.

The Court's prior declaration that the majority first mortgagees are entitled to relief from stay to take over servicing if a definitive agreement is not produced appears to warrant the

immediate entry of relief from stay. However, if the Debtor can provide proof within a short period of time (no more than 7 days) that Colt Gateway will have a binding commitment from its lender, Tabas would be willing to stand still in the interim. However, the production of an expired and meaningless letter strongly suggests that the deal presented to this court is illusory and Tabas and Fertitta should not be denied immediate relief if that is the case.

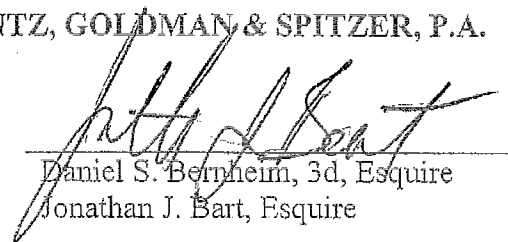
Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER, P.A.

Date:

3/13/07

BY:



Daniel S. Bernheim, 3d, Esquire
Jonathan J. Bart, Esquire

CERTIFICATE OF SERVICE

1. On March 13, 2007, I served the following document(s):

ESTATE OF DANIEL TABAS' LIMITED JOINDER TO FERTITTA ENTERPRISES, INC.'S OPPOSITION TO DEBTORS' MOTION TO AUTHORIZE USA COMMERCIAL MORTGAGE COMPANY AS LOAN SERVICER TO ACCEPT PAYMENTS AND PROVIDE RECONVEYANCES FOR TWO COLT GATEWAY LOANS

2. I served the above-named document(s) by the following means to the persons as listed below:

■ a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

- MICHELLE L. ABRAMS mabrams@mabramslaw.com
- FRANKLIN C. ADAMS franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com
- NANCY L ALLF nallf@parsonsbehle.com, klawrence@parsonsbehle.com; tthomas@parsonsbehle.com; ecf@parsonsbehle.com
- FRANK A. ANDERSON anderson.frank@pbgc.gov, efile@pbgc.gov
- OGONNA M. ATAMOH oatamoh@nevadafirm.com, bkecf@nevadafirm.com; paltstatt@nevadafirm.com; sliberio@nevadafirm.com
- KERIANN M ATENCIO ATENCIOK@GTLAW.COM
- BMC GROUP, INC. evrato@bmcgroup.com, ecf@bmcgroup.com; jmiller@bmcgroup.com; jbartlett@bmcgroup.com
- GEORGANNE W. BRADLEY georganne.bradley@bullivant.com, mary.opatrny@bullivant.com
- KELLY J. BRINKMAN kbrinkman@gouldpatterson.com
- THOMAS R BROOKSBANK tom@tombrooksbank.com, renee@tombrooksbank.com
- ANDREW M. BRUMBY abrumby@shutts-law.com, rhicks@shutts-law.com; lmackson@shutts-law.com
- LOUIS M. BUBALA lbubala@jonesvargas.com, tbw@jonesvargas.com; bjlingenfelter@jonesvargas.com
- MATTHEW Q. CALLISTER mqc@callister-reynolds.com, maggie@callister-reynolds.com
- CANDACE C CARLYON ltreadway@sheacarlyon.com, ccarlyon@sheacarlyon.com; bankruptcyfilings@sheacarlyon.com; rmsmith@sheacarlyon.com
- ROB CHARLES rcharles@lrlaw.com, cjordan@lrlaw.com
- MICHAEL W. CHEN yvette@ccfirm.com
- KEVIN B. CHRISTENSEN kbchrislaw@aol.com
- JANET L. CHUBB tbw@jonesvargas.com
- JEFFREY A. COGAN jeffrey@jeffreycogan.com, sarah@jeffreycogan.com
- WILLIAM D COPE cope_guerra@yahoo.com
- CICI CUNNINGHAM bankruptcy@rocgd.com
- LAUREL E. DAVIS bklsclv@lionelsawyer.com, ldavis@lionelsawyer.com; gbagley@lionelsawyer.com; ldavisesq@aol.com
- DEBT ACQUISITION COMPANY OF AMERICA V, LLC (tf) tfette@daca4.com
- THOMAS H. FELL BANKRUPTCYNOTICES@GORDONSILVER.COM

JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

JONES VARGAS
 100 W. Liberty Street, 12th Floor
 P.O. Box 281
 Reno, Nevada 89504-0281
 Tel: (775) 786-5000 Fax: (775) 786-1177

- SCOTT D. FLEMING sfleming@halelane.com, dbergsing@halelane.com, ecfvegas@halelane.com
- GREGORY E GARMAN bankruptcynotices@gordonsilver.com
- WADE B. GOCHNOUR wgochnour@hwmlvlaw.com, donnat@hwmlvlaw.com
- CARLOS A. GONZALEZ carlos.gonzalez2@usdoj.gov, Darlene.Ruckard@usdoj.gov; Eunice.Jones@usdoj.gov; Sue.Knight@usdoj.gov
- GERALD M GORDON bankruptcynotices@gordonsilver.com
- R. VAUGHN GOURLEY vgourley@lvcm.com
- TALITHA B. GRAY bankruptcynotices@gordonsilver.com
- JAMES D. GREENE bknotice@schrecklaw.com
- MARJORIE A. GUYMON bankruptcy@goldguylaw.com, ddias@goldguylaw.com
- JEFFREY R. HALL jhall@sheacarlyon.com, bankruptcyfilings@sheacarlyon.com; aboehmer@sheacarlyon.com; ltreadway@sheacarlyon.com; rmsmith@sheacarlyon.com
- XANNA R. HARDMAN xanna.hardman@gmail.com
- STEPHEN R HARRIS noticesbh&p@renolaw.biz
- JEFFREY L HARTMAN notices@bankruptcyreno.com
- BRIGID M. HIGGINS bankruptcynotices@gordonsilver.com
- JOHN HINDERAKER JHindera@LRL.com
- RICHARD F. HOLLEY rholley@nevadafirm.com, paltstatt@nevadafirm.com; vnelson@nevadafirm.com; sliberio@nevadafirm.com; bkecf@nevadafirm.com
- RANDOLPH L. HOWARD rhoward@klnevada.com, ckishi@klnevada.com; bankruptcy@klnevada.com
- DAVID W. HUSTON dwh@hustonlaw.net, swaits@hustonlaw.net
- CHRISTOPHER D JAIME cjaime@waltherkey.com, kbernhar@waltherkey.com
- EVAN L. JAMES ejameslv@earthlink.net, kbchrislaw@aol.com
- ANNETTE W JARVIS ajarvis@rqn.com
- TY E. KEHOE TyKehoeLaw@aol.com
- ROBERT R. KINAS rkinas@swlaw.com, jmcbee@swlaw.com; jmath@swlaw.com; imccord@swlaw.com
- DEAN T. KIRBY dkirby@kirbymac.com, jhebert@kirbymac.com; lackerman@kirbymac.com
- ZACHARIAH LARSON ecf@lslawnv.com
- JOHN J. LAXAGUE jlaxague@canecclark.com
- GEORGE C LAZAR glazar@foxjohns.com, gclazar@sbcglobal.net
- NILE LEATHAM nleatham@klnevada.com, ckishi@klnevada.com; bankruptcy@klnevada.com
- ROBERT C. LEPOME rlepome@cox.net, smstanton@cox.net
- ANNE M. LORADITCH ecf filings@beckleylaw.com, aloraditch@beckleylaw.com; pkois@beckleylaw.com
- PATRICIA A. MARR jjllaw@leelaw.lvcoxmail.com, lvlaw03@yahoo.com; mark@leelaw.lvcoxmail.com
- JAMES C. MCCARROLL , dturetsky@reedsmith.com; aleonard@reedsmith.com
- REGINA M. MCCONNELL rmccconnell@kssattorneys.com
- WILLIAM L. MCGIMSEY lawoffices601@lvcoxmail.com

JONES VARGAS
 100 W. Liberty Street, 12th Floor
 P.O. Box 281
 Reno, Nevada 89504-0281
 Tel: (775) 786-5000 Fax: (775) 786-1177

- RICHARD MCKNIGHT mcknightlaw@cox.net,
gkopang@lawlasvegas.com;cburke@lawlasvegas.com
- JEANETTE E. MCPHERSON bkfilings@s-mlaw.com
- JEANETTE E. MCPHERSON bkfilings@s-mlaw.com
- SHAWN W MILLER bankruptcyfilings@sheacarlyon.com,
smiller@sheacarlyon.com;aboehmer@sheacarlyon.com;ltreadway@sheacarlyon.com;rsmit
h@sheacarlyon.com
- DAVID MINCIN mcknightlaw@cox.net,
gkopang@lawlasvegas.com;dmincin@lawlasvegas.com;cburke@lawlasvegas.com
- JOHN F MURTHA jmurtha@woodburnandwedge.com
- ERVEN T. NELSON erv@rlbolick.com, susan@rlbolick.com
- VICTORIA L NELSON bkecf@nevadafirm.com,
vnelson@nevadafirm.com;paltstatt@nevadafirm.com;rholley@nevadafirm.com;sliberio@
nevadafirm.com
- BOB L. OLSON ecffilings@beckleylaw.com,
bolson@beckleylaw.com;dgriffis@beckleylaw.com
- DONNA M. OSBORN ebaker@marquisaurbach.com,
dosborn@marquisaurbach.com;tszostek@marquisaurbach.com;kgallegos@MarquisAurbac
h.com
- ANDREW M. PARLEN aparlen@stutman.com
- DONALD T. POLEDNAK sandplegal@yahoo.com, spbankruptcy@yahoo.com
- PAUL C RAY info@johnpeterlee.com
- CHRISTINE A ROBERTS bankruptcy@rocgd.com
- SUSAN WILLIAMS SCANN sscann@deanerlaw.com, palexander@deanerlaw.com
- LENARD E. SCHWARTZER bkfilings@s-mlaw.com
- JAMES PATRICK SHEA bankruptcyfilings@sheacarlyon.com,
ltreadway@sheacarlyon.com;rsmith@sheacarlyon.com;aboehmer@sheacarlyon.com
- SHLOMO S. SHERMAN ssherman@sheacarlyon.com,
aboehmer@sheacarlyon.com;bankruptcyfilings@sheacarlyon.com;ltreadway@sheacarlyon.
com;rsmith@sheacarlyon.com
- AMBRISH S. SIDHU ecf@slawnv.com
- JEFFREY G. SLOANE giklepel@yahoo.com, rmccconnell@kssattorneys.com
- ALAN R SMITH mail@asmithlaw.com,
turk@asmithlaw.com;marsh@asmithlaw.com;darby@asmithlaw.com
- DAVID A. STEPHENS dstephens@lvcm.com
- PETER SUSI cheryl@msmlaw.com, msm@msmlaw.com
- JEFFREY R. SYLVESTER jeff@sylvesterpolednak.com,
David@sylvesterpolednak.com
- CARYN S. TIJSSSELING ctijsseling@beckleylaw.com, jblair@beckleylaw.com
- AMY N. TIRRE ,lleverett@kkbrf.com
- AMY N. TIRRE atirre@kkbrf.com, leverett@kkbrf.com
- U.S. TRUSTEE - LV - 11 USTPRegion17.lv.ecf@usdoj.gov
- GREGORY J. WALCH GWalch@Nevadafirm.com
- RUSSELL S. WALKER rwalker@wklawpc.com,
eloveridge@wklawpc.com;lboynnton@wklawpc.com;ckirk@wklawpc.com
- WHITNEY B. WARNICK wbw@albrightstoddard.com, bstessel@albrightstoddard.com

JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

- WILLIAM J. WRAY wjw@oreillylawgroup.com,
rh@oreillylawgroup.com, bc@oreillylawgroup.com, lc@oreillylawgroup.com, ddh@oreillylawgroup.com, mr@oreillylawgroup.com
- JOAN C WRIGHT jwright@allisonmackenzie.com, jbrooks@allisonmackenzie.com
- MATTHEW C. ZIRZOW bankruptcynotices@gordonsilver.com
- ANTHONY A. ZMAILA azmaila@nevadafirm.com,
bkecf@nevadafirm.com; mbarnes@nevadafirm.com, paltstatt@nevadafirm.com

9 b. **United States mail, postage fully prepaid** (list persons and addresses):

9 c. **Personal Service** (list persons and addresses):
I personally delivered the document(s) to the persons at these addresses:

9 For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

9 For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

■ d. **By direct email (as opposed to through the ECF System)** (list persons and email addresses):

Frank Merola, Eve Karasik & Christine M. Pajak
fmerola@stutman.com; ekarasik@stutman.com; cpajak@stutman.com

Marc A. Levinson & Lynn Trinka Ernce
malevinson@orick.com; lernce@orrick.com

Andrew Welcher c/o William E. Winfield,
wwinfield@nche.com

Steven C. Strong, & Douglas M. Monson
sstrong@rqn.com; dmonson@rqn.com

Leonard E. Schwartz
Lschwartz@s-mlaw.com

Susan M. Freeman
sfreeman@lrlaw.com

August B. Landis
Augie.landis@usdoj.gov

Nevada Mortgage Lending Division
Attn: Susan Eckhardt
seckhardt@mld.nv.gov

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

9 e. **By fax transmission** (list persons and fax numbers):

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9 f. **By messenger:**

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed blow and providing them to a messenger for service. (A declaration by the messenger must be attached to this Certificate of Service).

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 13th day of March, 2007.

T. Waldo & J. Englehart
Name

//s// T. Waldo & J. Englehart
Signature

JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177